

**WO**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Troy Gandy,  
as Personal Representative of the Estate of)  
Sally Faye Robbins on behalf of the Estate)  
of Sally Faye Robbins, and on behalf of)  
Renee Montz, Paul Montz, Darrell)  
Robbins and Helen Robbins, statutory)  
beneficiaries,

No. CIV-03-1224-PCT-JAT

**ORDER**

Plaintiff,

vs.

United States of America,

Defendant.

Pending before this Court is Defendant's Motion in Limine ("Motion") regarding loss of future earnings. (Doc. # 145). On May 10, 2006, Plaintiff filed a Response to Defendant's Motion. The Court now rules on this motion.

**I. BACKGROUND**

On June 27, 2003, Sally Robbins ("Decedent") filed a Complaint in the United States District Court for the District of Arizona. Ms. Robbins brought the Complaint under the Federal Torts Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) and 2671 *et seq.*, alleging medical negligence on the part of the Defendant, United States of America. The Complaint alleged that Ms. Robbins suffered permanent injury to her pancreas and resulting pain and suffering, loss of wages, medical expenses, and permanent physical disability due to an endoscopic

1 retrograde cholangiopancreatogram (“ERCP”) negligently performed by the Veterans  
2 Administration Medical Center on September 9, 1999.

3 On May 22, 2005, approximately three weeks before trial, Ms. Robbins passed away.  
4 The medical examiner concluded that Ms. Robbins’ death was the result of a toxic level of  
5 combined prescription medications, some of which Ms. Robbins was taking because of her  
6 pancreatic problems. Ms. Robbins is survived by her children, Renee and Paul Montz, as  
7 well as her parents, Darrell and Helen Robbins. Troy Gandy (“Plaintiff”) was subsequently  
8 appointed as the personal representative of Sally Robbins’ estate with the consent of her  
9 surviving children.

10 On February 14, 2006, this Court issued the Order granting Plaintiff’s Motion to  
11 Amend Complaint. (Doc. # 130). The Order ruled that Troy Gandy, Personal Representative  
12 of Ms. Robbins’ estate, may bring a survival claim on the estate’s behalf under A.R.S. § 14-  
13 3110. The Amended Complaint, filed on February 21, 2006, includes a survival claim under  
14 A.R.S. § 14-3110 and a wrongful death claim pursuant to A.R.S. § 12-611, *et seq.* and A.R.S.  
15 § 12-561, *et seq.* on behalf of all statutory beneficiaries. (Doc. #131).

16 The Amended Complaint alleges wrongful death damages under A.R.S. § 12-613  
17 including loss of Decedent’s companionship, comfort, and guidance; and anguish, sorrow,  
18 stress, mental suffering, grief, shock, and other recoverable damages. (Doc. # 131). The  
19 Amended Complaint also alleges economic damages for Ms. Robbins’ lost earnings in the  
20 amount of \$522,117.00 under the survival statute, A.R.S. § 14-3110. (Doc. #131).

21 Defendant has moved to limit all evidence in the survival claim relating to loss of  
22 Decedent’s future earnings to the amount that Decedent actually lost between the time of her  
23 injury, September 9, 1999, and her death, May 22, 2005. (Doc. # 145).

## 24 II. LEGAL STANDARD AND ANALYSIS

25 The Court will address the pending motion to limit the time frame for economic  
26 damages recoverable under Arizona’s survival statute. This is a medical malpractice case  
27 under the FTCA, 28 U.S.C. §§ 1346(b) and 2671 *et seq.* Under the FTCA, tort liability of  
28 the United States is determined “in accordance with the law of the place where the act or

omission occurred.” 28 U.S.C. § 1346(b)(1); *see Richards v. United States*, 369 U.S. 1, 6 (1961). In this case, the substantive law of Arizona controls.

As a preliminary matter, this Court does not find it necessary or proper to certify this matter to the Arizona Supreme Court under A.R.S. § 12-1861 as suggested in Defendant’s Motion. Under A.R.S. § 12-1861, only questions “which may be determinative of the cause” pending in the district court may be certified to the Arizona Supreme Court. A dispute over possible damages in a survival claim is not determinative, therefore this Court elects not to certify the pending question.

**A. Recovery Under A.R.S. § 14-3110 and A.R.S. § 12-611**

A wrongful death claim and a survival claim are separate claims arising from the same incident. *Barragan v. Superior Court of Pima County*, 12 Ariz. 402, 404, 470 P.2d 722, 724 (Ct. App. 1970) (holding that a claim under the survival statute permits recovery for the wrong to the injured person, and the wrongful death statute confines recovery to the loss suffered by the beneficiaries). Remedies provided in the survival and wrongful death statutes are not mutually exclusive. *Id.* at 403, 470 P.2d at 723.

The survival statute provides that:

Every cause of action, except a cause of action for damages for breach of promise to marry, seduction, libel, slander, separate maintenance, alimony, loss of consortium or invasion of the right of privacy, shall survive the death of the person entitled thereto or liable therefor, and may be asserted by or against the personal representative of such person, provided that upon the death of the person injured, damages for pain and suffering of such injured person shall not be allowed.

A.R.S. § 14-3110. The survival statute provides for recovery of damages sustained by the decedent from the time of injury until her death. *Barragan*, 12 Ariz. at 403, 470 P.2d at 724. The claim passes from the decedent to the personal representative, and becomes an asset of the estate. *Id.* The purpose of the survival statute is “to prevent the tortfeasor’s liability from ceasing upon the injured person’s death.” *Id.* The survival statute, A.R.S. § 14-3110, does not create a new claim, but rather allows the personal representative to enforce the decedent’s claim. *Id.*

The wrongful death statute provides that:

1 When death of a person is caused by wrongful act, neglect or default, and the  
 2 act, neglect or default is such as would, if death had not ensued, have entitled  
 3 the party injured to maintain an action to recover damages in respect thereof,  
 4 then, and in every such case, the person who or the corporation which would  
 5 have been liable if death had not ensued shall be liable to an action for  
 6 damages, notwithstanding the death of the person injured, and although the  
 7 death was caused under such circumstances as amount in law to murder in the  
 8 first or second degree or manslaughter.

9 A.R.S. § 12-611. A wrongful death claim is neither continuation of the decedent's claim, nor  
 10 continuation of the survival claim under A.R.S. § 14-3110. *Barragan*, 12 Ariz. at 403, 470  
 11 P.2d at 724. A wrongful death claim compensates statutory beneficiaries for their injuries,  
 12 as opposed to a survival claim which compensates the decedent's estate. *Id.* When both  
 13 survival and wrongful death claims are asserted, recovery cannot be duplicative.

#### 14 **B. Motion to Limit Evidence of Decedent's Loss of Earnings**

15 To avoid duplication of the damages, Defendant has moved to exclude evidence of  
 16 economic damages for loss of Decedent's future earnings in the survival claim filed under  
 17 A.R.S. §14-3110. While enumerating which causes of action do not survive the death of the  
 18 plaintiff, the survival statute is silent as to which compensatory damages, including damages  
 19 for loss of future earnings, are allowed. A.R.S. § 14-3110 (quoted above). Further, there is  
 20 no Arizona case addressing loss of future earnings in a survival claim. In support of  
 21 Defendant's Motion requesting that damages for Decedent's future earnings in the survival  
 22 claim be limited, many jurisdictions,<sup>1</sup> as well as the Restatement (Second) of Torts, find that  
 23 recovery in survival claims is limited to damages accruing before the injured person's death.

24 In its Motion, Defendant cites several jurisdictions which hold that state survival  
 25 statutes do not entitle beneficiaries to recover damages for decedent's loss of future earnings.  
 26 Many jurisdictions hold that when damages are recoverable under both survival and wrongful

---

27 <sup>1</sup> See James O. Pearson, Jr., J.D., Annotation, *Recovery, in Action for Benefit of*  
 28 *Decedent's Estate in Jurisdiction Which Has Both Wrongful Death and Survival Statutes, of*  
*Value of Earnings Decedent Would Have Made After Death*, 79 A.L.R.3d 125 (1977).

1 death statutes, the damages recoverable under the survival statute do not include the loss of  
 2 decedent's future earnings.<sup>2</sup>

3 Defendant cites *Jones v. Flood*, 351 Md. 120, 716 A.2d 285 (1998), as evidence of  
 4 limited recovery in survival statutes. The Maryland Supreme Court in *Jones* addressed the  
 5 issue that is presently before this Court, and held that when a statute is silent as to the  
 6 recovery of loss of decedent's future earnings, then the recovery will be limited to the time  
 7 of injury through the time of death. *Id.* at 124, 716 A.2d at 287. The Maryland Supreme  
 8 Court based its ruling on the interaction between the wrongful death and survival statutes,  
 9 and stated "[t]he wrongful death damages begin with the death of the person wronged. The  
 10 survival claim damages end with the death of the person wronged. There is no overlap or  
 11 duplication of damages." *Id.* at 130, 716 A.2d at 290 (quoting *State ex rel. Smith v. Greene*,  
 12 494 S.W.2d 55, 60 (Mo. 1973)). The court's rationale in *Jones* is similar to the Arizona

---

14 <sup>2</sup> See, e.g., *O'Leary v. U.S. Lines Co.*, 111 F.Supp. 745, 747 (D. Mass. 1953)  
 15 (applying Massachusetts law and finding that loss of earnings are to be calculated from time  
 16 of injury to death of decedent); *Hooper Constr. Co. v. Drake*, 73 So.2d 279, 281 (Fla. 1954)  
 17 (prohibiting recovery for "loss of the decedent's prospective estate" in survival claim);  
 18 *Greene v. Texeira*, 505 P.2d 1169, 1170 (Haw. 1973) (holding future earnings of a decedent  
 19 are not proper for a survival claim); *Flowers v. Marshall*, 494 P.2d 1184, 1188 (Kan. 1972)  
 20 (finding that recovery would be doubled if loss of future earnings were allowed in survival  
 21 claim); *Sacco v. Allred*, 845 So.2d 528, 538 (La. Ct. App. 2003) (permitting recovery only  
 22 for loss of earnings sustained before death); *Adelsberger v. Sheehy*, 79 S.W.2d 109, 114 (Mo.  
 23 1953) (finding that loss of earnings "for the period [decedent] would have lived . . . cannot  
 24 be considered"); *Hindman v. Sulpho Saline Bath Co.*, NW 806, 808 (Neb. 1922) (finding no  
 25 loss of earnings may be recovered beyond time of death); *Kordonsky v. Andrst*, 172 A.D.2d  
 26 497, 499 (N.Y. 1991) (limiting damages to "loss of earnings up to the time of death"); *Case*  
 27 *v. Norfolk & Western Ry. Co.*, 570 N.E.2d 1132, 1137 (Ohio Ct. App. 1988) (limiting  
 28 damages for loss of earnings to the time of death); *St. Louis-S.F. Ry. Co. v. Hutchison*, 245  
 P. 891, 893 (Okla. 1926) (prohibiting damages for loss of earnings that accrue after death);  
*Lopez v. City Towing Assoc., Inc.*, 754 S.W.2d 254, 260 (Tex. Ct. App. 1989) (holding  
 decedent's estate is not permitted to recover lost future earnings); *Prunty v. Schwantes*, 162  
 N.W.2d 34, 38 (Wis. 1968) (finding that loss of future earnings does not survive the death  
 of injured party); see also, *Pezzulli v. D'Ambrosia*, 26 A.2d 659, 662 (Pa. 1942) (holding that  
 permissible recovery includes future earnings, but recovery may be adjusted to prevent a  
 double recovery).

1 Supreme Court's interpretation of claims under Arizona wrongful death and survival statutes.  
2 *See Barragan* at 405, 470 P.2d at 275 ("The latter begins where the former ends and recovery  
3 on both is not a double recovery for a single wrong but rather separate recoveries for  
4 different wrongs"). To prevent double recovery under the wrongful death and survival  
5 statutes, recovery for Decedent's loss of future earnings in the survival claim is limited to the  
6 time between her injury, September 9, 1999, to her death, May 22, 2005.

7 In the absence of prior decisions or authority to the contrary, the Arizona Supreme  
8 Court consistently follows the Restatement of Torts where applicable. *See Barnum v. Rural*  
9 *Fire Protection Co.*, 24 Ariz.App. 233, 238, 537 P.2d 618, 623 (Ct. App. 1975); *Mac Neil*  
10 *v. Perkins*, 84 Ariz. 74, 81, 324 P.2d 211, 215 (1958); *but see Barnes v. Outlaw*, 192 Ariz.  
11 283, 283, 964 P.2d 484, 486 (1998) ("although we generally follow the Restatement absent  
12 statutes or case law to the contrary, we do not do so blindly"). The Restatement of Torts  
13 supports granting Defendant's Motion. The Restatement does not allow the estate in a  
14 survival claim to recover decedent's loss of future earnings. Restatement (Second) of Torts  
15 §926(a) (1979) (providing an exception that limits "damages for loss or impairment of  
16 earning capacity . . . to harms suffered before the death [of injured person]"). The policy  
17 behind this limitation is to prevent overlapping recovery between wrongful death and  
18 survival statutes. *Id.* at cmt. (a). Loss of future income is recoverable under Arizona's  
19 wrongful death statute, A.R.S. § 12-613, therefore in order to prevent double recovery, as a  
20 policy matter, damages for loss of earnings in the survival matter must be limited to those  
21 incurred between Decedent's injury and her death.

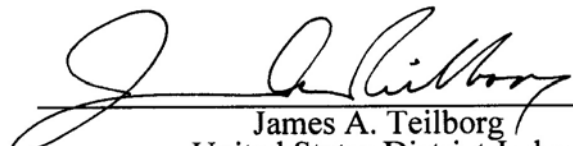
22 Lastly, Plaintiff argues that double recovery is a non-issue because the wrongful death  
23 claimants do not make a claim for future lost earnings, however the Court disagrees. The  
24 Amended Complaint seeks wrongful death recovery for injuries sustained including "other  
25 recoverable damages set forth in A.R.S. § 12-613." (Doc. #131 at 4:20-21). For this reason,  
26 the Court finds it necessary to limit the loss of future income recoverable under the survival  
27 claim to protect against potential double recovery.

1 The Court grants Defendant's Motion to limit all evidence concerning the loss of  
2 Decedent's earnings to the amount that Decedent actually lost between the time of her injury  
3 and her death for purposes of the survival claim. Accordingly,

4 IT IS ORDERED GRANTING the Defendant's Motion in Limine Re: Loss of Future  
5 Earnings. (Doc. # 145).

6 DATED this 31<sup>st</sup> day of May, 2006.

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



James A. Teilborg  
United States District Judge